TESTIMONY OF
Jack Valenti, President
Motion Picture Association of America
before the
COPYRIGHT ROYALTY TRIBUNAL
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I am duly grateful to you for allowing me to present to you the direct case of the television program supply industry. I might add, however immodest it may sound, that "the program" is the single indispensable attraction to the American viewing family. It is not satellites, nor head-ends, nor the mysterious path of light and sound, nor the magical new technology which the American family purchases when that family buys a television set or any other visual device or subscribes to cable. That family is buying programs.

Yours is a large responsibility.

We had hoped it would be possible to spare you some of your burden by negotiating among the contending parties to come to a sensible and fair conclusion. That has proven not to be possible. So we appear now at what the lawyers call "an

evidentiary proceeding" so that there can be a decision reached on how to resolve differences of opinion about how to distribute the cable royalty fund.

We of the program supply industry are eager to cooperate. You are seeking facts so you can make a rational judgment. I pray that we are able to give you what you want.

Indeed, this hearing is but one more way-station on a long 15-year journey that we have travelled. Our destination was a fair, thoughtful and reasonable Copyright Act, which would, with equity and understanding of a fragile and complex market-place, put a fair value on programs -- programs created by writers, directors, producers, actors; programs that were born in the minds of men and women and brought to life by their labors and their investment of capital.

I think it is fair to say that I am not happy with the scheme provided by the Copyright Act. I have said and continue to say that the Copyright Act is seriously, irremediably flawed for one reason: it fixes a price on our product which in no way is connected to analysis, to marketplace worth, to economic data of any kind. The copyright fee schedule was plucked from the air, barren of any relationship to what is real and true.

The only true value is that which is resolved in the marketplace. True value emerges from what the seller believes is a fair price and what the buyer is willing to pay. The Act, alas, is crippled because it fails to give to this Tribunal the authority required to make whatever revisions are needed, to judge what is appropriate and to conclude finally what true marketplace worth really is. In the absence of marketplace negotiations, in which buyer and seller bargain at arms-length, the only forum left to us is this Tribunal.

But, as you might rightly comment, this is neither the time nor the forum to deal with a legislative deformity.

I come before you today to plead our case on one level only: to make certain that the program suppliers, without whom there would be no television industry, no cable industry, no arena in which the new technology can enter are accorded justice. We plead for our FAIR SHARE of the cable royalty fund. We ask no less, we want no less, we deserve no less.

The program suppliers differ mightily from the other claimants in major and markedly significant ways which profoundly affect your decision.

First, it must be recognized that our claim is based on cable's carriage of syndicated programs which represent the great, great majority of programs carried by cable systems.

Second, we differ from other claimants by reason of the nature of syndicated programming. Our programming has national and universal appeal: "Happy Days" and "Kojak" will attract audiences in Peoria as well as Pittsburgh. Local programs, on the other hand, have principal appeal in their local market only. The local news and weather in Peoria does not command much interest, if any, in Pittsburgh. Nor will the fortunes of the Tuscaloosa basketball, soccer or bowling teams be of intense concern in Tacoma.

Third, unlike sports teams we do not have exclusive franchises. And unlike broadcast stations we do not have exclusive licenses for the use of the public spectrum; and we do not enjoy advertising revenues. On the contrary we are engaged in a fiercely competitive undertaking in the marketplace for the favor of the viewer. Our fortunes rise or fall depending on the creativity, the quality and the capital we invest in our creative efforts.

At issue in this proceeding is the allocation to claimants of the royalty fees paid by cable television systems in 1978 for

the carriage of distant non-network programs. The claims of the program suppliers are based upon programs produced and distributed by them to television broadcast stations. The production and distribution of these programs is a high-risk, capital intensive undertaking which demands huge financial investment, the expenditure of enormous amounts of time and energy, and -- most important -- creative talent. It is simply not possible to overstate the value of creative talent -- that indefinable, fragile but essential weaving without which the massive super-structure of television would collapse. The point was made some years ago in a Report prepared for the President's Task Force on Communications Policy (Television and the Wired City):

> "The final mystery, which itself explains all, is itself inexplicable -- the mystery of talent. Somehow the process by which the creative spirit fashions its wonders of communication to other humans continues to defy formularization and duplication; creativity is ultimately, and marvelously, a singular thing, unique, and thus by definition rare, thoroughly unpredictable as to time and place and manner of appearance. All that one can do is create the conditions most congenial to its nurturing.
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> The point merits emphasis at a time when communications technology and economic pressures combine to bring new questions of institutional reshuffling to the fore. Ultimately, what is at issue is not economics or the marvels of the electronic age but the content of the conduits, the product of the small band of creators on which the rest of the system feeds and which the public of the world consumes."

That is our business -- furnishing "the content of the conduit, the product of the small band of creators on which the rest of the system feeds and which the public of the world consumes."

The Tribunal is faced with the complex task of determining the claimants' respective shares to the cable royalty fund. The initial question to be determined -- and the one which I will address -- is the appropriate standard for judging the contributions of the claimants to that royalty fund. Although the Congress refrained from providing the Tribunal with specific criteria, under the statutory scheme (Section 504 of the Copyright Act), and consistent with the expressed view of Congress, the ultimate decision in this proceeding is controlled by two criteria -- namely, damage to the copyright owner and benefit to the cable system. It was the view of Congress that each CATV system is required to pay royalties because "the retransmission of distant non-network programming causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues." House of Representatives, Report No. 94-176, at p. 90, 94th Cong., 2d Sess. (1976).

In the application of the damage criterion to the claims of the program suppliers, it is essential to understand the how of the syndication process works -- and to recognize the importance of that process to the national television structure and service.

A syndicated program is a program licensed directly to individual stations for exhibition in their own local markets. These programs may be shows that were previously on a national network, or new "first run" syndicated programs never before shown on television. They generally consist of series of individual special programs produced for television and feature films that have played in theatres.

The syndication process begins with a commitment by the program producer to invest its own or borrowed capital to develop creative ideas for television programs. Those ideas which find favor are then subjected to a succession of increasingly rigorous and expensive tests which run the gamut from the preparation of story lines, completed scripts, and the production of pilots. At each stage of the process, the great majority of the proposals are winnowed out and fall by the wayside. The failure or mortality rate is extremely high, and for every 1,000 ideas or concepts, only some 35 programs may be produced and only one will get to syndication!

License fees for network exhibition or for first-run syndication seldom cover production and distribution expenses. Those relatively few shows which survive the process are then faced with the high "suicide" rate for network series shows. This makes the potential syndication recoupment for those few successful network series critical to the continuing function and viability of the syndication process. Unless a series runs a minimum of three years on a network, and accummulates at least 90 episodes, it will have little -- if any -- value in the syndication market.

It has, however, become harder and harder to syndicate television programs. The number of series shows that were exhibited on network television and later successfully syndicated to local stations has declined dramatically in recent years. In 1965, 16 programs entered the syndication market. The record of such successful programs in recent years furnishes a startling contrast. Thus in the 1970's and continuing through 1978, the year at issue in this proceeding, the number of such programs declined to an average of four per year.

It is the syndication of those relatively few programs that emerge from the narrow funnel of the syndication filtering process that hold out the possibility of reward to producers and

the creative community of recouping their investment, of earning a profit, and of providing the funds that will enable them to continue in the production and distribution of programs for television. This is the law of risk and reward which no parliamentary command can overcome.

It is clear that the carriage of these programs by cable television systems has had a serious and adverse effect on the syndication process and on the creators, producers and distributors of the programs which make that process work. The effect of such carriage was succinctly explained in the "Staff Report" of the House Subcommittee on Communications:

> "Currently, the copyright owner sells the exclusive use of his product for a particular time period and number of runs in a specified geographic area. He may sell to a network for nationwide distribution to affiliates, or he may 'syndicate' his product, i.e., sell to individual stations around the country. Frequently, network programming also enters the syndication market after the network contract has expired.
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> "The grant of an exclusive right to use copyrighted program material for a given time period and in a specified geographic area is basic to the way programs are currently marketed. Importation of a copyright owner's program from market A into market B seriously affects his ability to market his program in B. The Commission has recognized, as do we, the importance of the program production industry as 'fundamental to the continued functioning of the broadcast and cable television industries alike.' If cable systems were free to undermine the traditional method by which program producers market their product, without payment

> for the copyrighted material they use, the public interest in a diverse, healthy program production industry would be disserved." "Cable Television: Promise versus Regulatory Performance," Subcommittee Print, Subcommittee on Communications, House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976), p. 34.

The same conclusion was reached in a report prepared for the Rand Corporation by Stanley M. Besen, Willard G. Manning, Jr., and Bridger M. Mitchell. These recognized authorities conclude:

> The ... most significant difficulty with the cable provisions of the new law is their detrimental impact on the program supply markets. Since the fees generated by the fee schedule are likely to fall short of the value consumers place on the imported signals, the aggregate earnings of program suppliers will be too low ... . At first, the gap between actual and efficient revenues will be relatively small because distant signals now offer only limited competition to local stations; only one in seven homes has a cable connection. However, as cable penetration and distant signal importation increases, the ability of program suppliers to capture the full value of their programs will decline.

It is clear beyond any doubt that the carriage by cable of syndicated programs diminishes the value of these programs to the injury of the program suppliers.

The second criterion -- benefit to the cable industry -- requires only brief treatment, since the facts are simply overwhelming. Recognize that cable is in the business of selling and distributing the creative output of the program suppliers. As we shall demonstrate through our later testimony, the majority of the programs transmitted by cable consist of syndicated shows produced by the program suppliers; shows which were conceived, created and produced over a decade or more, at enormous risks, and represent expenditures of incalculable resources, including the commitment of the nation's creative talent.

And, how have cable systems fared in the exploitation of our programs? Their track record is literally mind-boggling. In the decade from 1968 to 1978, their subscribers multiplied more than four-fold, at an average annual increase of some 16 percent, from 3 million to 14 million. Based upon projections by the Department of Commerce and securities analysts, it is estimated that by 1981 total subscribers will exceed 19 million. In the year 1977, cable revenues exceeded 1 billion dollars; in 1978 its revenues exceeded 1 billion 250 million dollars; and the Department of Commerce predicts that in three years cable revenues will exceed 2 billion dollars.

Until January of 1978, these astronomical returns were realized without any payment of any nature whatsoever by cable television systems to the creators of the programs who made this impossible dream a reality -- not a sou, not a farthing, not a peppercorn, not even one deflated American dollar. And, for the year 1978, cable payment amounted to some 12 million dollars, an amount which must be viewed as a token payment only. To put it another way, some 65% - 75% of cable systems pay more for the postage stamps used to mail out their monthly customer invoices than they do for all of their programming!

When the tests of damage to the program supplier and benefit to the cable industry are applied to the cable royalty fund, it is markedly clear to the most disinterested observer that fair compensation to the program suppliers could be made only if you multiplied by several times the size of the royalty fund.

As I said at the beginning of this inquiry, we must deal with the Copyright Act as it exists, misshapen though it surely is now. We have tried to do that. We have constructed a massive project of data-gathering, extracting all that is possible and relevant to this Tribunal's charge so you can make reasonable judgments on how each claimant's share should be formed.

Our studies and our analyses establish that the program suppliers are entitled to, at minimum, 75% of the Fund. I pray that the Copyright Royalty Tribunal will decide that the conclusion we have reached is appropriate and just.

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